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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1944

No. 160

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,
a Corporation,
Petitioner,

vs.

G. W. BURLEY, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Brief for Petitioner.

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BRIEF FOR PETITIONER.

I.

Report of Opinion.

The opinion of the Circuit Court of Appeals (R. 110-113) is reported in 140 F. 2d 488.

II.

Statement of the Grounds on which Jurisdiction of th Court is Invoked.

The jurisdiction of this Court is invoked in accordan with the provisions of 240(a) of the Judicial Code, amended by the Act of February 13, 1925 (28 USCA 347 as more particularly set forth in Part B of the petiti for a writ of certiorari filed herein.

III.

Statement of the Case.

In an amended complaint filed in the District Court the United States for the Northern District of Illino Eastern Division, on November 2, 1942 (R. 96), the t respondents alleged diversity of citizenship and that t petitioner violated Article 6 of the labor agreement f yardmen between the petitioner and the Brotherhood Railroad Trainmen. The damages alleged by each r spondent varied from $3,500.00 to $14,000.00. The tot *ad damnum* was $65,274.00 (R. 98). . All responden were yardmen employed by the petitioner and membe of the Brotherhood of Railroad Trainmen (R. 4).

The complaint alleged that the petitioner ordered i train crews to commence work in the Whiting (Indian switch yard either before or after the times specified the labor agreement (R. 4) for starting train crews a that as a result of these alleged violations, each respon ent (R. 5) is "entitled to pay for an additional day, time and one-half, at the regular daily rate from Augu 26, 1934, to and including November 14, 1938, for ea foreman and each helper, for each day they were requir to work in yard service in the 'Whiting Yard' of t defendant, in accordance with the established practi

among railroads and employees thereof, and as provided in said Article 6 of said agreement as aforesaid."

The petitioner filed a motion to dismiss the original complaint (R. 9-39 inclusive) and also a motion for summary judgment (R. 42). The District Court rendered summary judgment for the petitioner (R. 84), from which an appeal was taken to the Circuit Court of Appeals (R. 85-86).

The Circuit Court of Appeals reversed the judgment of the District Court because of jurisdictional defects relating to diversity of citizenship (*Alderman* v. *Elgin, Joliet and Eastern Railway Company*, 125 F. 2d 971). In its directions, however, the Circuit Court of Appeals permitted the District Court to allow amendments to cure the jurisdictional defects. The amended complaint curing the jurisdictional defects thereafter (November 2, 1942) was filed by the respondents in the District Court (R. 96-98).

The District Court again entered summary judgment for the petitioner (R. 99-100). The respondents again appealed to the Circuit Court of Appeals. That Court in its opinion now before this Court for review (R. 110-113) found that the "record affirmatively shows there was an issue of fact" which should have been submitted to the jury and that "the motion for summary judgment should not have been granted" by the District Court. The judgment of the District Court again was reversed and the cause remanded with instructions (R. 113).

For many years prior to 1934, the intra-plant switching of Standard Oil Company refineries at Whiting, Indiana was performed by train crews employed by that company. On July 27, 1934, and subsequently to date, this intra-plant switching was performed by the petitioner. Yard crews employed by Standard Oil Company prior to July 27, 1934, were ordered to commence work each day at hours fixed in advance by plant management. These hours

varied from time to time, according to the demands of manufacturing operations (R. 32-33). Crews employed by the petitioner at all yards in Indiana and Illinois commenced work each day at hours which had been fixed many years prior to 1934, as set forth in Article 6 of the labor agreement between the petitioner and the Brotherhood for yardmen relating to "rules", working conditions and "rates of pay" (R. 4).

On November 23, 1936, the Brotherhood of Railroad Trainmen, the designated representative of all of the yardmen employed by the petitioner, filed a complaint before National Railroad Adjustment Board alleging that the petitioner had violated Article 6 of the labor agreement (R. 13). This complaint was assigned by the Board as Docket No. 3537 (R. 14).

On October 28, 1938, the President of the petitioner "settled" twenty-four "cases" or grievances with the designated representatives of the Brotherhood of Railroad Trainmen, after collective bargaining conferences with them as required by the provisions of the Railway Labor Act. These conferences were required also by the provisions of the labor agreement between the petitioner and the Brotherhood. The letter of the President of the petitioner (R. 16-23) proposing settlement and compromise of these cases, some of which were then pending before the National Railroad Adjustment Board, included Case No. 5, Board Docket No. 3537, the claim of the Brotherhood that Article 6 of the labor agreement had been violated.

That letter of settlement and compromise "accepted for the yardmen" on October 31, 1938, by the General Chairman and Secretary of the Brotherhood (R. 23), in part provided:

> "Case No. 5—Labor Board docket No. 3537—Starting Time of Switch Engines in Whiting S. O. Yard.
>
> "Settled by agreement that the starting times, for a ninety day trial period commencing November 15th,

1938, shall be the times provided for in Article 6 of the Yardmen's Agreement instead of the starting times heretofore agreed upon and now being followed. If at the end of the ninety day trial period the Railway Company or its employes claim that the starting times as fixed in Article 6 do not result in efficient and economical operation and in satisfaction to our employes and to the industry served, then representatives of the Railway Company and representatives of the Yardmen and representatives of the Engineers and representatives of the Firemen will sit down and work out a schedule of starting time best suited for meeting the special requirements of the industry. (R. 17.)

* * * * *

"We have by this letter given you a complete resume of all of the claims which have not heretofore been disposed of, filed by you on behalf of the employees whom you represent and have proposed in this letter a very liberal disposition of all of the cases involved. The settlements proposed are predicated on a complete settlement and withdrawal of all cases now pending either before the Board, or under discussion with this office except Case No. 4, which it is understood will be left to a decision by the National Railroad Adjustment Board, and it is further understood that in the event these settlements are accepted that the claims listed in this letter cover all claims of a similar nature, and that no other claims covering the same or like situations will be presented when such claims arise from causes occurring prior to the date of this settlement.

Yours truly,

(Signed) S. M. ROGERS,
President.

Accepted for the Yardmen: Oct. 31, 1938
(Signed) C. H. WILLIAMS,
General Chairman, B. of R. T.

(Signed) S. F. JOHNSON,
Secretary, B. of R. T."
(R. 23.)

On the same day, a letter was addressed to the Secretary of the National Railroad Adjustment Board by the President of the petitioner and the General Chairman of the Brotherhood (R. 24-25) advising the Board that certain cases then pending before it "have been settled and we, therefore, jointly request that they be withdrawn from the Docket of the Board (R. 24)." Included in the cases pending before the Board which the parties agreed had been "settled" and which the parties requested be withdrawn from the docket of the Board, was the case represented by the Board's Docket No. 3537 (R. 24), the claim of the Brotherhood that Article 6 of the labor agreement had been violated. On the same day, the President of the petitioner, Mr. A. F. Whitney, President of the Brotherhood, and the General Chairman of the Brotherhood were advised by the Board (R. 25-26) that Case No. 3537 and others were removed from the docket as requested.

Notwithstanding the execution of the settlement agreement on October 31, 1938, and the dismissal of the claim of the Brotherhood that the petitioner had violated Article 6 of the labor agreement, then pending before the Board, by a joint letter to the Board advising it that the case had "been settled" (R. 24), the Brotherhood on April 18, 1939 filed a second complaint before the Board (R. 71). This complaint was docketed as Case No. 7324 (R. 69) and in part stated: "Claim for one day's pay at time and one-half for each foreman and each helper for each day they were required to work in yard service in the Whiting (Standard Oil Company) Yard, in violation of the fixed starting time provided for in Article No. 6 of the Yardmen's Agreement of the Elgin, Joliet & Eastern Railway Company, effective January 1, 1927, and applicable to Whiting (Standard Oil Company) Yardmen, July 27, 1934, from dates of August 27, 1934, until November 14, 1938, inclusive" (R. 71).

On September 6, 1940, the Board in Docket No. 7324 issued its findings and award (R. 26-39) in part as follows:

> "The evidence shows that the parties to the agreement disposed of the claim here made by the letter of carrier dated October 28th, 1938, accepted by employes October 31, 1938.
>
> AWARD.
>
> Claim denied per Findings.
>
> NATIONAL RAILROAD ADJUSTMENT BOARD
> By Order of First Division
> Attest: (Sgd.) T. S. MCFARLAND,
> *Secretary.*"
> (R. 39.)

On November 19, 1940, the respondents filed their complaint in the District Court of the United States for the Northern District of Illinois, Eastern Division, subsequently amended as aforesaid.

The petitioner moved to dismiss (R. 9, 99) and for summary judgment (R. 42, 100) in the District Court for the reasons that (1) the Brotherhood of Railroad Trainmen, the exclusive bargaining representative for the respondent yardmen, and of which all of the respondents were members, "settled" the matter in dispute by the written agreement on October 31, 1938 (R. 16-23), (2) the said written agreement "accepted for the yardmen" released all claims of the respondents against the petitioner arising out of the alleged violations of Article 6 of the labor agreement between the Brotherhood and the petitioner and (3) the decision of the National Railroad Adjustment Board, First Division, on September 6, 1940 (R. 26-39) denying the claim of the Brotherhood filed for the benefit of the yardmen for the alleged violation of Article 6 of the labor agreement is "final and binding" upon the respondents.

IV.

Specification of Errors Assigned and Intended to be Urged.

The Circuit Court of Appeals erred:

1. In reversing the judgment of the District Court and in remanding this case to the District Court with instructions.

2. In not affirming the judgment of the District Court in favor of the petitioner.

3. In omitting to pass upon or make any reference to the issue in this case as to whether the award of the Adjustment Board is "final and binding."

4. In exercising its jurisdiction in any respect with reference to the suggested issues. When the Adjustment Board entered its award and denied the claim of the Brotherhood under the facts and circumstances in this case, the award of the Adjustment Board is "final and binding." The District Court in the new suit at law for damages lacked power to consider issues *de novo.*

5. In rendering its decision that whether collective bargaining agents of the Brotherhood of Railroad Trainmen, who for many years prior to and at the times in question were the exclusive designated representatives of the yardmen of the petitioner in conducting collective bargaining negotiations, must present to the petitioner evidence of "the authority of the so-called agents of the plaintiffs to negotiate, compromise or settle plaintiffs' claims . . . ."

6. In holding that there was presented in this case a disputable question of fact for jury determination when the Adjustment Board previously had rendered its award denying the same claims presented for the yardmen now respondents in this case.

7. In omitting to find *as a matter of law* that the award of the Adjustment Board was "final and binding" upon the respondents.

V.

The Summary of Argument.

The award of the Adjustment Board of September 6, 1940 denied the claim of the Brotherhood for additional pay at time and one-half for each day worked from August 27, 1934 until November 14, 1938. That award is final and binding upon the respondents, the petitioner and the District Court in this proceeding. Section 153 (m) of the Railway Labor Act (45 USCA) provides that such awards "shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award." The award of the Board was not a money award because it did not include "a requirement for the payment of money" as stated in Section 153 (o) of the Act.

The claim before the Board was the same as the liability predicated in the complaint in the case at bar. Neither the claim filed before the Board nor the complaint filed in the District Court assert liability for overtime or back wages. The respondents were paid for the time worked. The claims relate only to *penalty* damages.

All procedural requirements of the Railway Labor Act were followed. The respondents were heard before the Board by their designated representatives. The District Court had no power to exercise its jurisdiction. By the Railway Labor Act, Congress deprived courts of power to pass upon issues in this case. Summary judgment for the defendant was correctly entered by the District Court. This Court should affirm.

The authority of the Brotherhood Chairman to file the claim before the Board is granted to him by the provisions of the Railway Labor Act as a designated representative of the respondents. That authority is not limited by technical rules of agency, as stated in the opinion of the Circuit Court of Appeals. Thus there was no issue of fact for jury determination. The Railway Labor Act removed the issue from the scope of court adjudication. The award of the Board is the terminal point of the grievance and is "final and binding" upon this Court in this case.

The collective bargaining agreement of October 31, 1938, signed by the President of the petitioner and the General Chairman and Secretary of the Brotherhood, deprived the respondents of all claims against the petitioner for the alleged violation of Article 6 of the labor agreement. If the respondents in this case, more than two years after the execution of this compromise agreement, may deny the authority of their designated representatives to act for them in the execution of this agreement and present this issue as a justiciable controversy, as in the case at bar, after the Adjustment Board has examined the compromise agreement and given legal effect to it, then collective bargaining is meaningless and the Railway Act is "a dead letter." Neither the rules and the by-laws of the Brotherhood nor the by-laws and resolutions if adopted by the Board of Directors of the petitioner can limit the mandatory provisions of the Railway Labor Act or nullify compromise agreements executed by designated representatives of the respondents and of the petitioner, in accordance with the provisions of the Act.

The labor agreement between the petitioner and the Brotherhood provided that "any controversies arising as to the application of the rules herein agreed upon . . . shall be taken up . . ." by the General Committee with the General Superintendent, "and in the event of their failure

to agree upon a satisfactory settlement, the Committee may appeal to the Vice President." Thus, the petitioner was required by its labor agreement as well as by the Railway Labor Act to treat only with the General Committee of the Brotherhood after the grievances had been appealed to the General Superintendent or to the Vice President.

The Court should not exercise jurisdiction in this case because the respondents failed to exhaust their remedies before tribunals of the Brotherhood relating to the alleged want of authority of the Brotherhood officials in executing the compromise agreement of October 31, 1938 and in filing the claim before the Board upholding that collective bargaining agreement. The failure of the respondents to exhaust their remedies before the Brotherhood tribunals prevents court adjudication.

The District Court correctly entered summary judgment for the petitioner. The law is clear that the District Court has the right to consider facts presented by affidavits or exhibits in support of a motion to dismiss and in support of a motion for summary judgment. There was no question regarding the truth of these affidavits and exhibits. *Their truth is admitted.*

There is no question arising under the due process clause of the Fifth Amendment. The respondents could have filed an action in court and could have obtained judicial determination of the issues presented. The fact that they did not elect to do so does not present a constitutional question for this Court to determine. Furthermore, by collective bargaining, all claims of the respondents for a violation of Article 6 of the labor agreement were extinguished by the compromise agreement of October 31, 1938. Therefore, the complaint in the case at bar did not state a cause of action upon which relief could be granted. This presents no constitutional question. The District Court correctly entered summary judgment for the petitioner.

VI.

ARGUMENT.

A.

The award of the Adjustment Board of September 6, 1940 denied the claim of the Brotherhood for additional pay at time and one-half from August 27, 1934 until November 14, 1938. That award is final and binding upon the respondents.

All respondents in this case are members of the Brotherhood (R. 4). The Brotherhood claimed that the petitioner violated Article 6 of its labor agreement relating to yardmen and on April 18, 1939, asked the Board (R. 71) to enter an award for

> "one day's pay at time and one-half for each foreman and each helper for each day they were required to work in yard service in the Whiting (Standard Oil Company) Yard, in violation of the fixed starting time provided for in Article 6 of the Yardmen's Agreement of the Elgin, Joliet and Eastern Railway Company, effective January 1, 1927, and applicable to Whiting (Standard Oil Company) Yardmen, July 27, 1934, from the dates of August 27, 1934, until November 14, 1938, inclusive."

This claim is the same as the liability predicated by the complaint in the case at bar.

The respondents were paid for the time worked. The claim filed before the Board and the complaint filed in the District Court assert no liability for overtime or back wages. Each seeks *penalty* damages (R. 80, 83).

After briefs were filed by the Brotherhood and by the petitioner, the Board, on September 6, 1940, entered its award (R. 26-39) which concluded (R. 39) as follows:

> "The evidence shows that the parties to the agreement disposed of the claim here made by the letter of carrier dated October 28th, 1938, accepted by employes October 31, 1938.
>
> Award.
>
> Claim denied per Findings."

The petitioner claims that this award is "final and binding" upon the respondents in this case and a bar to their recovery. Furthermore, it deprives courts of jurisdiction.

The Circuit Court of Appeals in its opinion (R. 110-113) did not pass upon these issues, although requested to do so.

The District Court, however, found (R. 83) that

> "there was no adverse relationship between the Brotherhood and these plaintiffs in that proceeding before the Board, and I think that the controversy was submitted to the Board, that it had jurisdiction and that it was decided, and that the plaintiffs were represented there and were bound thereby. . . . I think the ruling of the Adjustment Board was binding upon the plaintiffs as well as upon the defendant and that it is binding upon this court in this proceeding."

The Railway Labor Act, 45 USCA, Section 153(m) in part provides:

> "The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award."

The award of the Adjustment Board was not a "money award" within the meaning of the Railway Labor Act.

The award did not direct the petitioner to pay money. Paragraph (o) of the same section of the Railway Labor Act in part provides that:

> "if the award includes a requirement for the payment of money", "the division of the Board shall make an order, directed to the carrier, to make the award effective and . . . to pay to the employee the sum to which he is entitled under the award on or before a day named."

The Railway Labor Act itself clearly indicates that a "money award" is an award which "includes a requirement for the payment of money" and that *if the award does not include such a requirement*, it is not a "money award" within the meaning of paragraph (m) of the Act.

Section 153 (i) of the Railway Act provides:

> "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

Paragraph (j) of the same section provides that the parties may be heard either in person, by counsel, or by "other representatives, as they may respectively elect . . ."

Paragraph (k) in part provides:

> "That final awards as to any such dispute must be made by the entire division as hereinafter provided."

Paragraph (l) provides that upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority of the members, a referee may be selected "to sit with the division as a member thereof and make an award." Such an award was made in the case at bar.

Full compliance was made with all procedural requirements of the Railway Labor Act. The respondents in the case at bar were heard before the Board by their designated representatives, as provided by the Act. Notice to the duly constituted officers of the Brotherhood is sufficient to bind the respondents. *Estes, et al.*, v. *Union Terminal Co.*, 89 F. 2d 768. Therefore, the award of the Board is "final and binding" upon the petitioner and the respondents here.

The respondents, however, seek to obtain indirectly what the Railway Labor Act prohibits. There is no provision in the Act for court review of an award of the Board when that award is in favor of the carrier and in opposition to the claims of the employees. The clear intention of Congress is that there should be no court adjudication or review, directly or indirectly, in such a case (*Washington Terminal Company* v. *Boswell, et al.*, 124 F. 2d 235, affirmed 319 U. S. 732). The Court (124 F. 2d 235) at page 244 stated:

> "We think, therefore, that Congress intended the Board to be and to act as a public agency, not as a private go-between; its awards to have legal effect, not merely that of private advice. It intended the employees, when successful before the Board, to have definite and substantial probative and financial advantages in suits to enforce awards, which they cannot have in other suits. Because this is so, and because the Act gave the employees two years in which to sue for enforcement, we think Congress intended the courts during that period to keep hands off these controversies except in the manner specified in the

Act. This would be true if it were necessary to re gard the issue now presented as involving the exis tence of jurisdiction to entertain other forms of suit It is equally true, when the issue is considered as presenting a question of sound judicial discretion in declining to exert jurisdiction, more especially since this is a suit for a declaratory judgment. To permit maintenance of this suit would short-circuit both the administrative proceeding and the special statutory suit. It would make the Railway Labor Act a dead letter so far as legal effect is concerned, perhaps also as a 'voluntary, private system of negotiation.' So far as the intention of Congress goes, therefore, we cannot believe these results were contemplated."

In the case of *Berryman* v. *Pullman Co.*, 48 F. Supp. 542, a discharged Pullman porter, through the designated representatives of the Brotherhood of Sleeping Car Porters, presented his claim for back wages and reinstatement to the officials of the company and then to the Adjustment Board, as required by the Railway Labor Act. The Adjustment Board denied the plaintiff's claim. This award was claimed by the defendant in a motion for summary judgment to have finally settled the controversy. The Court at page 543 stated:

"The award of the Adjustment Board contained no money award. It did determine that plaintiff was discharged because of and as a result of his own misbehavior. That finding is made final by the statute. There is no room for a subsequent inquiry into the same question by the Courts. But by the present action plaintiff seeks to have the Court do just that. He voluntarily submitted the dispute to the Adjustment Board, got its decision and cannot now ignore it."

The motion for summary judgment for the defendant was sustained.

To permit courts generally to exercise their jurisdiction after the Board has entered its award in favor of the

railroad and against the Brotherhood representing the yardmen in circumstances similar to the case at bar not only would violate the clear provisions of the Act but also would disregard the legislative history of that Act and the preceding legislation. The first act dealing with railway labor in 1888 and all subsequent legislation prior to the 1934 amendments to the Railway Labor Act of 1926 contain no provision which made awards of adjustment boards final and binding. (See first annual report of the National Mediation Board, including the report of the National Railroad Adjustment Board for the fiscal year ended June 30, 1935.)

The 1934 amendments creating the National Railroad Adjustment Board and paragraph (m) in question indicated the clear intention of Congress that when the claim of the designated representatives of a class or craft of employees could not be "adjusted" with officers of the railroad and when such a claim was "referred" to the Adjustment Board, and the Board handed down its award denying the claim, such award was intended to be "final and binding upon both parties to the dispute."

No procedure for court review is provided for by the Act. It is clear, therefore, that in such a case Congress intended that the award of the Board should be the terminal point of the grievance. If the respondents in the case at bar may now obtain unlimited court adjudication of their claims by a trial *de novo*, the expressed intention of Congress will be nullified.

Since the award of the Board in this case is "final and binding", it follows that the District Court had no power to exercise its jurisdiction. As stated by the District Court, the award of the Board was binding upon that Court "in this proceeding." By the Railway Labor Act, Congress deprived courts of power to pass upon issues in the circumstances of the case at bar. Therefore, there was no

issue of fact for jury determination. As a matter of law, the Railway Labor Act has made the award of the Board "final and binding." All issues in this case are thereby removed from court adjudication. The summary judgment for the defendant was rightly entered by the District Court and should be affirmed.

The respondents claim that the Chairman of the Brotherhood exceeded his authority in filing the claim before the Board on April 18, 1939. The prior claim (Docket No. 3537) filed by him with the Board on November 23, 1936 (R. 13, 14), "settled" on October 31, 1938, and then withdrawn from the docket of the Board, they admit was filed by the Brotherhood Chairman with their authority (R. 48). However, the second claim was "referred" to the Board by the Brotherhood Chairman in the same manner as many prior claims against the petitioner had been "referred" by him to the Board. The Secretary of the Board followed his customary practice and on May 18, 1939, gave notice to the President of the petitioner and also to Mr. A. F. Whitney, President of the Brotherhood, that the claim was "referred" to the Board (R. 69).

Ostensible authority should guide the Board and this Court in reviewing the actions of the Brotherhood Chairman. Furthermore, by paragraph (i) of the Act, hereinbefore quoted, the Brotherhood Chairman is granted authority to refer the dispute to the Board for its award.

In *Virginian Railway Co.* v. *System Federation No. 40*, 131 F. 2d 840, 844, the Court stated:

> "Indeed, Congress, by the terms, philosophy and history of the Act, seems to have turned to the representatives (which are normally labor unions) of the employees as the usual agents for attempting to settle controversies arising under the Act and for enforcing the awards of the Board. Again, the analogy of the National Labor Relation Act, 29 U.S.C.A. § 151 *et seq.*, has persuasive force here."

In the case of *Division 525, Order of Ry. Conductors of America* v. *Gorman, et al.*, 133 F. 2d 273, the Court at page 278 stated:

> "The defendants assert that they have dealt with the designated representative of the Order, that they did this in entering into the contract of March 3, 1941, and they dealt with the same designated representative when they entered into the contract of November, 1941, terminating the contract, and that having so done they have complied with the law and that they had a right to assume that O. L. Coulter, the general Chairman, was acting with full authority and that agreements with him were valid. They say: 'If such an agreement can be set aside by individual lodges or members of the Order, then railroads can never enter into an agreement with the Order as bargaining agent and the whole system of collective bargaining on the part of the employees, provided by the Railway Labor Act, will de destroyed.'
>
> It appears without dispute that the defendants have dealt with the representative of the Order in effecting the collectively bargained agreements, and they cannot be required to examine into the specific authority granted the representative of the Order."

If the petitioner is required to act at its peril regarding the authority of the General Chairman of the Brotherhood to represent the yardman, for whom he is the designated representative within the meaning of the Railway Labor Act, then the question of specific instructions by employees to the designated representative will be present in every case "referred" to the Board and also in every case "handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes," as provided in paragraph (i).

If the authority of the designated representative is questionable by either the employees or the employer in every case "referred" to the Board and in every step

of the grievance procedure, collective bargaining made mandatory by the Railway Labor Act will be destroyed. The result will be that the petitioner and other railroads may not "treat" with the designated representatives of the Brotherhood or of other unions, unless and until "the authority of the so-called agents of the plaintiffs to negotiate, compromise and settle plaintiffs' claims for damages for the violation of Article 6" or for the alleged violation of any labor agreement has been clearly established regarding respective amounts claimed by each particular employee affected, as required by the opinion of the Circuit Court of Appeals (R. 112).

The stopping of each collective bargaining conference for the purpose of establishing agency between the designated representatives and the particular employees and the delay in each proceeding "referred" to the Board, for the purpose of establishing this agency and the scope of authority of the designated representatives, will necessarily make collective bargaining too complicated for administration and illusory. Apart from the administrative difficulties, the mandatory provisions of the Act, as regards the petitioner "imposes the affirmative duty to treat only with the true representative, and, hence, the negative duty to treat with no other." (*Virginian Railway Co.* v. *Federation*, 300 U. S. 515, 548.) In addition, the Act (45 USCA 152, Second) imposes the duty upon the petitioner and the designated representatives to consider and, if possible, to decide all disputes "with all expedition."

Furthermore, Rule No. 10 of the "Constitution and General Rules of the Brotherhood of Railroad Trainmen" presented to the District Court for its consideration prior to ruling on the motions to dismiss and for summary judgment, and presented also to the Circuit Court of Appeals, provides in part that:

> "Whatever action may be taken by the General Grievance Committee or Board of Adjustment of any system within the meaning of the above General Rules shall be law to the Lodges on that road until *and unless reversed by the* Board of Appeals, and if any member refuses to vote or abide by the action of such General Grievance Committee or Board of Adjustment, he shall be expelled from the Brotherhood for violation of obligation."

Therefore, the ostensible authority of the Brotherhood Chairman in filing the claim before the Board, Section 153 (i) and (m) of the Railway Labor Act and Rule No. 10 of the Brotherhood authorized the filing of the claim before the Board on April 18, 1939. The subsequent award of the Board denying relief is final and binding upon the respondents, the petitioner and the courts in this proceeding.

B.

The collective bargaining agreement of October 31, 1938, signed by the President of the petitioner and the General Chairman and Secretary of the Brotherhood, deprived the respondents of all claims against the petitioner for the alleged violation of Article 6 of the labor agreement.

The pertinent provisions (R. 17, 23) of the collective bargaining agreement are set forth on pages 4 to 5 of this brief.

This compromise agreement is typical of collective bargaining required by the Railway Labor Act. The agreement made final disposition of thirty-eight cases, some of which had been referred to the Board by the Brotherhood. Approximately seventy-two employees benefited by the settlements. All cases relate to rates of pay, rules and working conditions. The intention of the parties as expressed in the agreement is clear and unambiguous.

The agreement was intended to be "a complete settlement" of case No. 3537 then pending before the Board and provided "that no other claims covering the same or like situations will be presented when such claims arise from causes occurring prior to the date of the settlement."

On the date of its execution, the parties advised the Board that the case docketed as No. 3437 had been "settled" and jointly requested that it be withdrawn from the docket of the Board (R. 24). The President and General Chairman of the Brotherhood and the President of the petitioner were thereupon advised by the Secretary of the Board that the case had been withdrawn from the Board's docket (R. 25).

In addition to the parties advising the Board that the case docketed as No. 3537 had been "settled," the Board itself, in the award of September 6, 1940 (R. 26-39), found that the compromise agreement of October 31, 1938 disposed of all claims filed on April 18, 1939 (R. 71), by the designated representative of the respondents in Board's Docket No. 7324. These claims are the same as those presented by the respondents in the case at bar. The finding of fact by the Board to the effect that the parties "disposed of the claim here made by the letter of the carrier, dated October 28, 1938, accepted by the employees October 31, 1938" (R. 39) is binding on courts in this proceeding.

The Railway Labor Act (45 USCA 152) in part provides:

> "First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of

any carrier growing out of any dispute between the carrier and the employees thereof.

. . .

"Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

. . .

"Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: . . .

. . .

"Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this chapter, . . . The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

. . .

"Tenth. The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending

> shall be subject to a fine of not less than $1,000, nor more than $20,000, or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of said paragraphs of this section shall constitute a separate offense. . . ."

Thus, in executing the compromise agreement of October 31, 1938, the parties merely carried out the duties imposed upon them by the Act "to settle all disputes" "concerning rates of pay, rules, and working conditions," and that all "disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference by the representatives designated and authorized so to confer. . . ."

The petitioner, its officers or agents are subject to severe fines and imprisonment, or both, for each offense each day the petitioner, its officers or agents wilfully fail or refuse to comply with the duties imposed by section 152 of the Act. If the carrier, as the petitioner here, concludes a collective bargaining agreement with the designated representatives of the employees and more than two years later those employees, as the respondents here, may deny the authority of the designated representatives to act for them in the execution of the agreement and if they may litigate the claim in courts after the Adjustment Board has denied them, collective bargaining is meaningless and the Railway Labor Act is "a dead letter." The rules and by-laws of the Brotherhood, even if they did apply to the actions of the General Chairman and Secretary of the Brotherhood in this case, cannot limit the compulsory requirements of the Act. Nor could a by-law or resolution of the Board of Directors of the petitioner limit them. The mandatory provisions of the Act are supreme.

Article 25 of the agreement between the petitioner and its yardmen requires that "any controversies arising as

to the application of the rules herein adopted" shall be taken up by the "General Committee" of the Brotherhood. Thus, treating with the designated representatives is required by the collective bargaining agreement as well as by the Railway Labor Act.

The labor agreement between the defendant and the Brotherhood (Exhibit "H," filed in the District Court and in the Circuit Court of Appeals), upon which the plaintiffs predicate liability, refers to the procedure for the "handling" of grievances. Local lodges or local grievance committees of the Brotherhood have no authority to "take up" grievances with the General Superintendent or the Vice President of the defendant. By the terms of the labor agreement, this power is given only to the General Grievance Committee of the Brotherhood on the Elgin, Joliet and Eastern Railway System, of which C. H. Williams was General Chairman and S. F. Johnson was Secretary. These persons in their official capacities signed the compromise agreement of October 31, 1938.

The defendant is bound by the provisions of its labor agreement with the Brotherhood and by the provisions of the Railway Labor Act. The compulsory provisions of that Act requiring the defendant "to settle all disputes," if possible, with the designated representatives of the Brotherhood culminated in the settlement agreement of October 31, 1938. This was in compliance with the provisions of the labor agreement and of the Act. The award of the Board found that the agreement "disposed" of the claims upon which the respondents now seek to recover. The claims of the respondents asserted more than two years after the execution of the compromise agreement cannot override the provisions of the labor agreement between the petitioner and the Brotherhood that grievances "shall be taken up" by the General Committee and not by the respondents individually. Nor can they override

the duties imposed by the Railway Labor Act upon the petitioner and the respondents' designated representatives "to settle all disputes."

In *Donovan* v. *Travers, et al.* (Sup. Jud. Ct. of Mass. 1934), 285 Mass. 167, 188 N. E. 705, the Court at page 707 stated:

> "The substantial issue is whether the rights of the plaintiffs are fixed by the terms of the agreement between the union and the railroad as it stood when the several plaintiffs entered upon their service interpreted only in the light then available; or whether as the agreements changed from time to time, the modifications and possible changes in interpretation of terms agreed upon by the union and the railroad modified and affected the individual contracts of those already in the railroad's employ. We think the latter to be the proper position. The transaction is an agreement between an employer and a labor union designed by the latter to benefit itself and those members who enter the employer's service. The employee stands no higher than the union. If it modifies the agreement with the employer, the employee must acquiesce. In no correct sense is the union an agent. It is a principal."

When a compromise agreement is executed with the designated representatives of the employees, all employees, as the respondents here, are bound thereby. *Smith et al.* v. *Texas & N. O. R. Co.*, 32 F. Supp. 1013, 118 F. 2d 75; *Division 525, Order of Railway Conductors* v. *Gorman et al.*, 133 F. 2d 273; *System Federation* v. *Louisiana Ry. Co.*, 119 F. 2d 509.

In the *Smith* case, the agent-telegrapher's children sought to recover from the railroad back wages due the agent-telegrapher who died while his designated representatives were negotiating a compromise agreement. Subsequent to his death, the agreement was concluded providing for pay-

ment of wage losses for those "who now hold the status of employees." The Court at page 1014 states:

> "the plaintiffs now before us and of age, neglected to advise and consult with the representatives of the Order of Railroad Telegraphers before the compromise agreement was had, with the view of protecting specially the rights, if any, of their deceased father. The jurisprudence is persuasive that they were on notice and were represented; and, therefore, their rights were decided at the compromise between the employees as a group and the carrier."

The employee died six months *before* the execution of the compromise agreement allowing back wages. If the rules of common law agency were applicable, as held by the Circuit Court of Appeals in the case at bar, death of the employee revoked the agency and his children would not have been bound by the provisions of the compromise agreement made by the "designated representatives" during collective bargaining negotiations. The Circuit Court of Appeals, however, held that his children were bound by the agreement. The defendant's motion to dismiss was sustained.

This Court should effectuate the intention of the parties as expressed in the compromise agreement of October 31, 1938 to settle all claims relating to Article 6 and providing that "no other claims covering the same or like situations will be presented when such claims arise from causes occurring prior to the date of this settlement." Apart from any provisions of the Railway Labor Act, the compromise agreement in question arrived at through collective bargaining requires that the claims of the respondent be denied and that the summary judgment entered for the petitioner by the District Court be affirmed.

C.

Courts should not exercise jurisdiction in the case at bar because the respondents failed to exhaust their remedies before the tribunals of the Brotherhood for the alleged want of authority of the Brotherhood officials in executing the compromise agreement of October 31, 1938.

The respondents filed no proceeding before the Adjustment Board to vacate the award of the Board dated November 6, 1940, on account of the alleged want of authority of the Brotherhood officials in filing the complaint in docket No. 7324, or on account of the want of authority by the Brotherhood officials in executing the negotiated compromise agreement of October 31, 1938.

Neither did the respondents file any proceeding before the Brotherhood officials, in accordance with the provisions of the constitution and by-laws of the Brotherhood, seeking to have nullified the authority exercised by the Brotherhood officials in execting the negotiated compromise agreement and subsequently filing a claim before the Adjustment Board in docket No. 7324. Rule 10 attached to the Brotherhood Constitution provides for an appeal to the various tribunals existing for that purpose created by the Brotherhood for any member who is not satisfied with any action taken by the Grievance Committee.

The failure of the respondents to exhaust the remedies open to them within the Brotherhood before seeking relief in court for any wrong alleged to have been committed by the officials of the Brotherhood prevents court adjudication. *Mallory* v. *Carroll* (Supreme Judicial Court of Massachusetts, 1930) 172 N. E. 790, 272 Mass. 524; *Snay* v. *Lovely, et al.* (Supreme Judicial Court of Massachusetts, 1931) 176 N. E. 791; 276 Mass. 159.

The respondents are estopped from repudiating the negotiated compromise agreement of October 31, 1938. *Brisbin* v. *Brotherhood of Railway Clerks* (Supreme Court of Nebraska, 1938) 279 N. W. 277; *Division 525, Order of Ry. Conductors* v. *Gorman, et al.*, 133 F. 2d 273; *Evans, et al.* v. *Johnson, et al.*, 300 Ill. App. 78, 20 N. E. 2d 841, certiorari denied, 309 U. S. 662; *Franklin, et al* v. *Pennsylvania-Reading*, 122 N. J. Eq. 205, 193 A. 712.

D.

The District Court correctly entered summary judgment for the petitioner.

The law is clear that the District Court has the right to consider facts presented by affidavits or exhibits in support of a motion to dismiss and in support of a motion for summary judgment. In the case at bar, there was no question regarding the truth of the facts set forth in the petitioner's affidavits and exhibits. *Their truth is admitted.*

Civil Procedure Rule 12 (b) provides:

> "Every defense, in law or *fact* . . . shall be asserted in the responsive pleading thereto *if one is required*, except that the following defenses may at the option of the pleader be made by motion: (1) Lack of jurisdiction over the subject matter, . . . (6) Failure to state a claim upon which relief can be granted." (Italics ours.)

The law is clear that affidavits may be considered in support of a motion to dismiss. *Moore's Federal Practice Under the New Federal Rules*, Vol. 1, states at page 646:

> "It is to be noted that Equity Rule 29 authorized only defenses in point of *law arising upon the face of the bill* to be made by motion. On the other hand

> Rule 12 (b) authorizes *every* defense in law *or fact* to be made in the responsive pleading, and then authorizes certain of those defenses to be first made by motion, if the party is so advised. The scope of Rule 12 (b) is as broad as the field of defense. Unless a motion may be accompanied by affidavit or make reference to depositions on file in the case its utility is seriously impaired. . . . It would be quibbling to hold that Rule 12 (b) does not authorize a motion raising defense (6) to be accompanied by an affidavit that the statute of limitations had run, or that the claim was barred by *res judicata.*"

Rule 6 (b) of the District Court relates to the service of evidentiary matter in support of or in opposition to motions and clearly contemplates the filing of evidentiary matter in support of a motion to dismiss. Rule 6 (b) in part provides:

> "In serving notice of a motion in support of which *evidentiary matter* is required or intended to be submitted . . . copies thereof shall be served with the notice. Parties opposing the motion shall serve and file . . . *any evidentiary matter or affidavits upon which they intend to rely.*" (Italics ours.)

The Circuit Court of Appeals for the Second Circuit in the case of *Central Mexico Light & Power Co.* v. *Munch*, 116 F. 2d 85, decided that affidavits may be received on a motion to dismiss for want of jurisdiction, and whether the motion is called a motion to dismiss or a motion for summary judgment is not important since the same relief is sought. The court at p. 87 stated:

> "Moveover, in two separate affidavits, he raised the question of jurisdiction, and in one he asked specifically for dismissal on that ground. Plaintiffs' suggestion that Munch is not relying upon this objection surely is not well taken, nor is plaintiffs' objection that the motion to dismiss of the other defendants came too late. It is not important whether

the objection is called a motion to dismiss or one for summary judgment. Since the same relief is sought the difference in name is unimportant. In any event, the affidavits presented are available on either motion."

Mr. Justice Clark in *Palmer* v. *Palmer,* 31 F. Supp. 861, at p. 863, stated:

"The present proceedings arise on defendants' motion for judgment on the pleadings and motion for summary judgment. These are presented as two separate motions, the former dealing only with issues of law on the pleadings and the latter only with whether there were any triable issues of fact in view of the affidavits filed. I see no occasion for treating them as thus distinct. Both motions seek a single relief, judgment for the defendants; in granting that relief I feel I am justified in relying on any or all appropriate grounds disclosed by any or all the papers of record in the case. *United States Trust Co. of New York* v. *Sears,* D. C. Conn., 29 F. Supp. 643, 645."

In the footnote on p. 863 the Court stated:

"If these various motions must be kept in separate compartments, then little has been gained by the abolition of the demurrer, for a hierarchy of objecting proceedings, each calling for separate procedural steps and formal hearings, will then still persist. Logically but one relief is sought; as a matter of practical convenience all appropriate reasons therefor should be advanced and considered as a single step."

The District Court for the Northern District of Alabama in the case of *Alabama Independent Service Station Assn., Inc.* v. *Shell Petroleum Corp.,* 28 F. Supp. 386, at p. 388 stated:

"At this point it may be worth while to advert to the question whether facts appearing in affidavits, depositions and answers to interrogatories may be

considered in the disposition of a motion to dismiss. Rule 12 (b) of the Rules of Civil Procedure provides that 'every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter . . . (6) failure to state a claim upon which relief can be granted . . .' This rule differs significantly from the former Equity Rule 29 in that the latter provided only for 'every defense in point of law arising upon the face of the bill' by motion. We are of the opinion that the affidavits, depositions and answers to interrogatories may be considered here on all the motions, the latter being within the terms of Rule 12 (b) defenses in law *and* fact."

Petitioner's motion to dismiss the complaint may be treated as a motion for summary judgment. Facts set forth in the motion or in documents accompanying the motion need not be sworn to for the purpose of receiving the consideration of the Court.

In the case of *Samara* v. *United States,* Circuit Court of Appeals, Second Circuit, 129 F. 2d 594, the Court at p. 597 stated:

"Upon the trial of his action the question will arise whether he is limited to the evidence presented to the Commissioner. If the present record fairly presents such question, judicial economy will obviously be served by an immediate decision rather than by remanding the case for trial. We think the question is fairly presented, since the defendant's motion to dismiss may be treated as one for dismissal under Rule 12(b) (6) for failure to state a claim, or one for summary judgment under Rule 56(b). See Federal Rules of Civil Procedure, Rules 12 and 56, 28 U.S.C.A. following section 723(c). The new rules have been held to authorize 'speaking' motions, and thus permit the allegations of the complaint to be

supplemented by the certified copies of the claim for refund and the letters of the Commissioner, annexed to the motion, the correctness of which is not disputed. See *Gallup* v. *Caldwell*, 3 Cir., 120 F. 2d 90, 92; *Cohen* v. *American Window Glass Co.*, 2 Cir., 126 F. 2d 111, 114."

In the case of *Victory* v. *Manning*, 128 F. 2d 415, the defendant filed a motion to dismiss and attached to his motion photostatic copies of letters unaccompanied by any affidavits. The Circuit Court of Appeals, Third Circuit, held this to be proper and at p. 417 stated:

> "However, we find no requirement either in the Federal Rules of Civil Procedure or in the Rules of the District Court of New Jersey that facts alleged in motions and not otherwise appearing of record should be sworn to or contained in an affidavit. The general tenor of the Rules, as they pertain to this question, indicates, rather, that the use of affidavits under such circumstances is discretionary with the parties or the court. Certainly, since a fact can be alleged in a motion, without verification, there would be little logic, in the absence of a specific rule to the contrary, to require the exhibits accompanying that motion to be under oath. The waiver was therefore properly before the court in this case."

Civil Procedure Rule 56 (b) clearly provides that a defendant may file a motion for summary judgment "at any time . . . with . . . supporting affidavits. . . ."

Civil Procedure Rule 56 (c) provides that "the judgment sought *shall* be rendered forthwith if the pleadings . . . together with the affidavits . . . show that . . . there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Italics ours.)

Civil Procedure Rule 56 (e) relates to the form of affidavits and further testimony in support of a motion for summary judgment for the defendant.

Moore's Federal Practice Under the New Federal Rules, Vol. 3, (1938) states at page 3181:

> "A defending party may move for summary judgment at any time after a pleading stating a claim against him is served upon him. He is not required to serve his responsive pleading first. There is no necessity for a time limitation upon the making of a motion by a defending party, as his motion is directed at the claim and his defenses will appear in his supporting affidavit or other evidence. A typical instance where a defendant may move for summary judgment before serving his answer is when he admits the facts stated in the complaint but asserts the statute of limitations as a defense. Similarily, a defending party may make the motion before answer in any case where his defense involves only a question of law. And he may also make the motion before answer where he can show that the complaint is without merit or that he has a defense which will clearly defeat the claim asserted against him."

On page 3185 the authors, citing many cases, state:

> "Where there is no genuine issue of fact, the court is required by Rule 56 (c) to render summary judgment in favor of the moving party if he is entitled thereto as a matter of law. The existence of an important, difficult, or complicated question of law, where there is no issue as to the facts, is not a bar to a summary judgment. Rule 56 (c) clearly contemplates and requires that the court render summary judgment in such a situation."

On page 87 of the supplement to Volume 3, the authors cite many cases in point and state:

> "Similarly, where it appears from the affidavits, pleadings or depositions that there are no issues of fact, and the issues of law resolve themselves in favor of the defendant, a summary judgment may be entered on the defendant's motion."

The summary judgment procedure outlined in Rule 56 is a procedural device for promptly disposing of actions in which there is no genuine issue as to any material fact. The purpose is to eliminate a trial in such cases, since a trial is unnecessary and results in delay and expense. To attain this end, the rule permits a party to pierce the allegations of fact in the complaint and to obtain relief by summary judgment when the facts set forth in detail in affidavits and exhibits and admissions show there are no genuine issues of fact to be tried. [*Moore's Federal Practice,* Vol. 3(1938) pages 3174-5.] Thus, the District Court examines evidence not to try an issue but to determine where there is a genuine issue of fact proper for trial.

Summary judgment procedure does not infringe the constitutional right of a party to a jury trial.

Fidelity and Deposit Co. v. *U. S.* (1902) 187 U. S. 315.

Ex Parte Peterson (1920) 253 U. S. 300.

General Investment Co. v. *Interborough Transit* (1923) 235 N. Y. 133, 139 N. E. 216.

Port of Palm Beach District v. *Goethals,* (CCA 5th, 1939) 104 F. 2d 706.

E.

No question is presented arising under the due process clause of the Fifth Amendment to the Federal Constitution.

The respondents claimed in the court below that Section 153 (m) of the Railway Labor Act which provides that awards of the Board are final and binding upon both parties to the dispute, except insofar as they shall contain a money award, violates the due process law of

the Fifth Amendment to the Constitution. The respondents point out that if they obtain an award of the Board and the carrier refuses to make payment, the employees may file a suit for enforcement in the District Court. In that proceeding, the carrier may present evidence regarding any defense and in effect obtain judicial review of the decision of the Board on the merits of the case.

No corresponding right is given by the Railway Labor Act to the carrier to file a suit in the District Court when the award of the Board is in favor of the carrier. Nor have the respondents the right to judicial review when the Board's award is in favor of the carrier. Neither can the carrier obtain judicial review or court determination if the award of the Board is in favor of the employees and the employees do not seek enforcement in a suit filed in the District Court. *Washington Terminal Railway* v. *Boswell, et al.*, 124 F. 2d 235.

The petitioner contends that the negotiated compromise agreement of October 31, 1938 is an effective agreement and extinguished the claims asserted by the respondents in this case. For that reason, the District Court had no power to exercise its jurisdiction and this Court is not called upon to consider the constitutional question. The complaint filed by the respondents in the District Court failed to state a claim upon which relief can be granted and, therefore, the District Court correctly entered summary judgment for the petitioner. The constitutional question is moot.

Furthermore, the respondents in the first instance were not required to present their claims before the Adjustment Board. They could have directed their designated representatives to file a complaint in court and, thereby, obtain judicial determination of their claims. *Moore* v. *Illinois Central Railroad*, 312 U. S. 630. The failure of

the respondents to elect to obtain court adjudication in the first instance presents no constitutional question in this case.

CONCLUSION.

The award of the Board entered November 6, 1940 is final and binding upon the respondents, the petitioner and the courts in accordance with the provisions of the Railway Labor Act. The District Court had no power to exercise its jurisdiction. The complaint filed by the respondents did not state a claim upon which relief could be granted. Summary judgment was correctly entered by the District Court for the petitioner. Furthermore, apart from any provision in the Railway Labor Act, the collective bargaining agreement of October 31, 1938 extinguished all claims of the respondents for the alleged violation of Article 6 of the labor agreement. This Court should effectuate the intention of the parties at the time the agreement was executed. This presents no facts for jury determination. The judgment of the District Court should be affirmed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1944

No. 160

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,
a Corporation,
Petitioner,

vs.

G. W. BURLEY, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Reply Brief for Petitioner.

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SUMMARY OF ARGUMENT.

The Railway Labor Act imposes upon the parties a new terminology and new concepts. It compels the performance of new duties. It creates rights and privileges for employees and their designated representatives. It blocks out the nomenclature of the common law.

The authority of designated representatives to act is not specifically delegated by respondents. That authority springs from the Railway Labor Act. In like manner, that authority cannot be limited by lack of specific directions from respondents or by rules and by-laws of the Brotherhood, to which the respondents belong.

Designated representatives of the employees have power to change labor agreements. The Act so provides. Designated representatives also have power by the Act "to settle all disputes" and "with all expedition". Designated representatives have power by the Act, also, to compromise grievances, as was done in the case at bar in the execution of the compromise agreement of October 31, 1938.

Collective bargaining compromise agreements are not required to meet the technical requirements of consideration necessary for contracts of common law. The only requisite is that such agreements express the intention of the parties. This was done by the compromise agreement of October 31, 1938. The Adjustment Board so found in its award.

There is no dispute in the case at bar that the parties who executed this agreement were the designated representatives nor is there any dispute that the designated representative who filed the claim before the Adjustment Board was the proper representative to file such a claim. The Railway Labor Act gave this representative power to "refer" the claim to the Board, if he so elected. The fact that the claims may affect the "personal" or "individual" rights of the respondents does not destroy the final and binding effect of the award of the Board.

The final and binding provision in the Act, paragraph (m), should be construed to read that non-money awards of the Board shall be final and binding upon both parties to the dispute except insofar as the Act otherwise provides and except insofar as the constitution prohibits. The

respondents are forced to take the position that if there is an award of the Board against the employees or their designated representative, the employees can "disregard" the award because "it is of no effect whatsoever." This construction opposes the clear expression by Congress that awards shall be final and binding. The Senate and House reports at the time of the adoption of the 1934 amendments refer not only to a "compulsory" system of "adjudication" but also to the requirement that the Board shall "hear and decide" the disputes.

Paragraph (m) does not deny respondents due process of law required by the Fifth Amendment. Respondents and the designated representatives have the right to file a suit at law for damages and there obtain due process. If the designated representative elects to file a claim before the Board, the respondents are bound thereby and cannot (after the award of the Board issues against them) claim that the election of their designated representative deprives them of due process.

The argument that the respondent would have "a right of review" by courts if the award of the Board was in favor of the employees ignores the provision in paragraph (p) that enforcement proceedings in the District Court by petition are permissive only. The employees *may* file the petition but are not required by paragraph (p) to file it. The Fifth Amendment is a limitation upon the powers of the Federal Government. It is not directed against the election made by a designated representative not to have court adjudication of claims of the respondents. Therefore, the lack of due process argument does not apply.

ARGUMENT.

A.

The award of the Adjustment Board of September 6, 1940, denied the claim of the Brotherhood for additional pay at time and one-half from August 27, 1934 until November 14, 1938. That award is final and binding upon the respondents.

Throughout the brief for respondents there occur frequently the terms "release", "*res judicata*", Brotherhood as "agents" of the respondents, Brotherhood officials acting within scope of "authority," "valid consideration," "no consideration" and "meeting of the minds". This nomenclature of the common law is blocked out by the Railway Labor Act. The Act imposes on the parties a new terminology and new concepts. It compels the performance of new duties. It creates new rights and privileges for employees and their designated representatives.

The authority of the designated representatives to act is not specifically delegated by respondents. That authority springs from the Railway Labor Act. In like manner, that authority cannot be limited by lack of specific directions from respondents or by rules and by-laws of the Brotherhood, to which the respondents belong.

To permit such a limitation would destroy the powers granted to the designated representatives by Congress. The rules and by-laws of the Brotherhood can no more limit the compulsory requirements of the Act (Petitioner's brief, p. 24) than could by-laws or resolutions of the Board of Directors of the petitioner limit them. The mandatory provisions of the Act are supreme.

Respondents argue (brief, p. 14):

> "We submit that no rights of the members can be alienated without the member's consent, as the 'Board' and the lower Court did in the instant case."

Again (brief, p. 16) respondents argue:

> "Certainly, the right to damages is as valuable as a seniority right, and we believe the court should not fail to follow these decisions in holding that a union, nor its officials, cannot waive or destroy it."

The Act itself (45 USCA 152, Seventh) provides for changes in rates of pay, rules or working conditions as follows:

> "Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreement or in section 156 of this title."

Another provision of the Act (45 USCA 156 provides:

> "Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

When changes in the labor agreement are made in accordance with these provisions, personal rights of members of the union may be "alienated" or destroyed without their "consent". As stated in *System Federation* v. *Louisiana and A. Railway Co.*, 32 F. Supp. 89, 90 (affirmed 119 F. 2d 509):

> "This was collective bargaining and the various plaintiffs herein were bound. It follows from the plain reading that any and all claims for *damages* for a violation of seniority rights are foregone and cancelled, certainly as far back as February 9, 1931." (Italics ours.)

Designated representatives of the employees have power to change the labor agreement. The Act so provides. Designated representatives also have power to compromise grievances. That power to make the compromise agreement of October 31, 1938, effective is derived from the provisions of the Act authorizing representatives "to settle all disputes" and "with all expedition."

Collective bargaining compromise agreements do not need to meet the technical requirements of consideration required by contracts of common law, as respondents argue (brief, p. 17-19). The only requisite is that the agreements express the intention of the parties to settle grievances. That was done in the compromise agreement of October 31, 1938. The Adjustment Board so found in its award.

Respondents argue (brief, p. 23) that the Board has no jurisdiction of their "individual" claims because there was no "authority" in C. H. Williams, Chairman of the Grievance Committee, to present the same to the Board. There is no dispute that C. H. Williams, as Chairman of the General Grievance Committee, was the designated representative of the respondents. He alone is the official of the Brotherhood authorized to file claims before the Adjustment Board. The first claim filed before the Board

relating to the alleged violation of Article 6 was filed by C. H. Williams as "General Chairman—BRT—EJ&E System" (R. 14). It is admitted by all respondents (brief, p. 25) that this claim was properly filed. The second claim for the alleged violation of Article 6 was filed by C. H. Williams as the designated representative of the respondents and as "General Chairman, B. of R. T., E.J.&E. System" (R. 72). This claim was filed in accordance with the provisions of Section 153 (i) of the Act (45 USCA) which in part provides that ". . . failing to reach adjustment . . ., the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with the full statement of the facts and all supporting data bearing upon the disputes."

Respondents argue (brief, p. 25) that designated representatives do not have authority under the Act or under the constitution and by-laws of the Brotherhood to file before the Board "claims for pay or claims for breach of contract." Respondents admit, however, (brief, p. 24) that the designated representatives do have authority to file before the Board claims relating to "rates of pay, rules or working conditions."

The claim filed before the Board by the designated representative in the case at bar related to rates of pay, rules and working condtions. The labor agreement or "schedule" signed by the Brotherhood and the petitioner in this case (Exhibit "H") is entitled "Rules and Rates of Pay for Yardmen." Respondents in their complaint predicated liability of the petitioner in accordance with Article 6 of that agreement.

The dispute "referred" to the Board in the case at bar was a dispute concerning "rates of pay, rules, and working conditions." The Act gave the designated representative the power to "refer" this claim before the Board, if he so elected. The fact that such a claim may

affect the "personal" or "individual" rights of the respondents is immaterial. Congress intended that disputes concerning these rights may be referred by the designated representative to the Board for adjudication. If specific authority of the designated representative is necessary from each employee relating to matters affecting the "personal" or "individual" rights of each employee, designated representatives will be stymied in carrying out their statutory duties. Furthermore, if such specific authority is necessary, one of the main objects of the Act "to settle all disputes" and "with all expedition" will be frustrated, contrary to the policy of Congress.

Respondents in their brief (pp. 24, 26) refer to *Griffin* v. *Chicago Union Station*, 13 F. Supp. 722, and *Nord* v. *Griffin*, 86 F. 2d 481, certiorari denied, 300 U. S. 673, for the purpose of showing that if the designated representatives do not have specific authority from the particular employee, the award of the Board is void and, also, that if the particular employee affected does not have actual notice of the hearing before the Board, that employee is denied due process of law guaranteed by the Fifth Amendment.

It is admitted that cases similar to *Griffin* v. *Chicago Union Station* and *Nord* v. *Griffin* are exceptions to paragraph (m) that non-money awards of the Board shall be final and binding. In other words, paragraph (m) should be construed to read that non-money awards of the Board shall be final and binding on both parties to the dispute, except insofar as the Act otherwise provides and except insofar as the constitution prohibits.

It is important to note also that in these cases (*Griffin* v. *Chicago Union Station and Nord* v. *Griffin*) the designated representatives before the Board took a position which was *adverse* to some employees. That relation does not apply to the facts in the case at bar. The designated

representative before the Board was a *proponent* of the claims for the respondents, the same which are asserted in the complaint now before this Court.

There is no requirement in the Act that notice shall be given to each particular employee who may be affected by the award when a claim is filed in his behalf by the designated representative. The designated representative had power by the Act itself to "refer" the claims of the respondents to the Adjustment Board for adjudication. The designated representatives of the respondents also had the right before their claims were referred to the Board for adjudication to file suit at law for damages. *Moore* v. *Illinois Central Railroad Co.*, 312 U. S. 630.

Nevertheless, once the case is referred to the Board by the designated representative and the Board has decided it and denied the claim of respondents, respondents later cannot assert the same claim in court. The policy of the Act that non-money awards of the Board are final and binding deprives courts of power, directly or indirectly, to pass upon the same claims adjudicated by the Board, except in the special cases for which provision is made in paragraph (p) of the Act, which provides the exclusive remedy for court review. *Cf. Baltimore and Ohio R. Co., et al.* v. *Brady*, 288 U. S. 448, 457; *I. C. C.* v. *United States*, 289 U. S. 385, 394.

When the designated representative files a claim before the Board, the action on the labor agreement at law which therefore existed is merged in the award. If this result does not follow, every time the claim filed before the Board by the designated representative is denied, the temptation will be great for each employee involved to assert that the designated representative did not have specific authority to file the claim and that, therefore, the employee should have another day in court by filing a suit at law for damages. This reasoning would destroy the policy of Congress to make non-money awards final and binding, ex-

cept as provided in paragraph (p), and would result in the intended adjudication of the Board being a mere ritual with no legal significance.

B.

No question is presented arising under the due process clause of the Fifth Amendment to the Federal Constitution.

On page 27 of the brief for the respondents there is presented the argument that

> "Certainly, the award asked for by Williams was a money award, and though it was not awarded, it 'contained' a money award."

This construction does violence to the language of paragraph (m). Paragraph (m) cannot reasonably be construed to mean that the awards of the Board shall be final and binding upon both parties to the dispute except insofar as the claims filed by the designated representative sought to obtain a money award.

Apparently, counsel for the respondents themselves are not impressed with the argument because on page 31 they argue

> "If there is an award against the employee by the Adjustment Board, he can, for all practical purposes, disregard the same because it is of no effect whatsoever as far as he is concerned."

This conclusion is necessary for the respondents to maintain this suit. It disregards the provisions of the Act clearly expressed by Congress. There was no intention at the time of the passage of the 1934 amendments to the Railway Labor Act that awards by the Board denying claims of the employees might be "disregarded" and be considered of "no effect whatsoever." The policy declared by Congress was quite the contrary.

The Senate report on the 1934 amendments (Report No. 1065, 73rd Congress, 2nd Sess., Page 1 *et seq.*) in part stated:

> "Congress passed the Railway Labor Act with the joint approval of both the representatives of the railroads and the railway labor organizations. They believed it would enable them to settle their differences without the element of compulsion. . . .
>
> "One of the principal weaknesses of the law in practice has been that regional boards have not been set up in some sections of the country for settlement of the disputes in some of the crafts. Both representatives of the carriers and of the employees agree that the setting up of boards for the settlement of disputes should be made compulsory, when necessary. Representatives of the carriers proposed that the setting up of regional boards be made compulsory; representatives of most of the employees insisted that the setting up of the National Board of Adjustment with four divisions be made compulsory. . . .
>
> "The ideal situation would be to have disputes and grievances settled by the men and management on the several properties without any recourse to adjudication by an outside tribunal. Some of those advocating this legislation believe the fact that there is a compulsory board to which grievances may be taken will greatly increase the settlement of disputes by voluntary adjustment boards between the employees and the railroads."

Furtherfore, the report on the 1934 amendments by the House of Representatives (Report No. 1944, 73rd Congress, 2nd Sess.) in part stated:

> "This bill, therefore, provides for the establishment of a National Board of Adjustment to which these disputes may be submitted if they shall not have been adjusted in conference between the parties. . . .
>
> "Division 1 is given authority to hear and decide the disputes involving train, engine, and yard service employees, such as engineers, firemen, conductors, trainmen and switchmen. . . .

> "The committee is confident that this bill strengthens the Railway Labor Act where it is necessary to do so, and feels sure that if the Act is amended as proposed in this bill it will provide effective and adequate machinery to adjust controversies between the carrier, managements and employees. It will assure employees the right to bargain collectively and will contribute immeasurably to the establishment and maintenance of industrial peace."

The respondents argue (brief, p. 29) that paragraph (m) violates the due process clause of the Fifth Amendment because

> "when an award is entered against the employer and he refuses to comply therewith, it is necessary for the employee to file a suit at law, which is a trial *de novo*."

The respondents concluded (p. 29) that

> "This situation affords the employer a right of review of the decision of the 'Board,' and refuses the same right of review to the employee."

This argument ignores the well settled policies of Brotherhoods not to seek court review when the award of the Board is in favor of the employee. In practice, the Brotherhoods rely upon their economic force. The argument that such an award is "absolutely meaningless" (respondents' brief, p. 32) is unrealistic. Generally, Brotherhoods do not find it "necessary" to file a suit at law to enforce awards of the Board in favor of employees. Consequently, carriers seldom are given a "right of review".

Furthermore, "a right of review" is not granted to the carrier by paragraph (p) of the Act when the award is in favor of the employee. Paragraph (p) is permissive only. It provides that if the carrier does not comply with the order of the Board, the petitioner or any person for

whose benefit such order was made *may* file in the District Court a petition setting forth the causes for which he claims relief.

Finally, if the designated representative elects to file a claim before the Board rather than before a court (*Moore* v. *Illinois Central Railroad Co.*, 312 U. S. 630), neither the designated representative nor the employees may complain about the want of due process if the award of the Board is adverse. Due process of law by court adjudication is always available to designated representatives or employees before they elect to file a claim before the Adjustment Board. The same considerations apply to a carrier before any claim is filed before the Board by designated representatives or by the employees. In these circumstances, the lack of due process argument does not apply.

The Fifth Amendment is a limitation upon the powers of the Federal Government. It is not directed against an election by designated representatives to avoid court adjudication. (*Corrigan, et al.* v. *Buckley*, 271 U. S. 223; *Teague* v. *Brotherhood of Locomotive Firemen*, 127 F. 2d 53.)

Court review is not a necessary supplement to due process of law in the Fourteenth Amendment. (*Reetz* v. *Michigan*, 188 U. S. 505; *Plymouth Coal Company* v. *Pennsylvania*, 232 U. S. 531, 547; *L. & N. R. Co.* v. *Greene*, 224 U. S. 522; *Hardware Dealers Mutual Fire Insurance Company* v. *Glidden Co.*, 284 U. S. 151.) Neither is court review necessary to due process of law in the Fifth Amendment. (*United States* v. *Heinze*, 218 U. S. 532; *Luckenbach S. S. Co.* v. *United States*, 272 U. S. 533; *National Labor Relations Board* v. *Jones and Laughlin Steel Corporation*, 301 U. S. 1, 46; *Virginian Railway Co.* v. *System Federation, No. 40*, 300 U. S. 515, 558.)

CONCLUSION.

When the petitioner made the compromise agreement of October 31, 1938, with the designated representatives of the respondents, the petitioner was not required to look behind the authority conferred by the Railway Labor Act upon the designated representatives to make the settlement. Specific authority of each respondent or of the local lodge to which the respondents may belong is not required by the Railway Labor Act. The respondents are bound by the collective bargaining compromise agreement of October 31, 1938. This Court should so decide and reverse the judgment of the Circuit Court of Appeals.

The award of the Adjustment Board finding that the compromise agreement disposed of all claims of the respondents against the petitioner should be held final and binding upon the respondents and a bar to this proceeding.

It "seems plain that the command of the statute to negotiate for the settlement of labor disputes, given in the appropriate exercise of the commerce power, cannot be said to be so arbitrary or unreasonable as to infringe due process." (*Virginian Railway Co.* v. *System Federation, No. 40*, 300 U. S. 515, 559.)

If the award against the employee may be "disregarded" and considered "of no effect whatsoever," as respondents contend in their brief (p. 31), the statutory scheme of settlement of railroad disputes devised by Congress will have no legal consequences. The result intended by Congress should be effectuated by this Court. That result can be obtained only by reversing the judgment of the Circuit Court of Appeals and affirming judgment for your petitioner entered by the District Court.

Respectfully submitted,

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